Testimony of Joe Rogers
Before the Judiciary's Committee Subcommittee on the Constitution
United States House of Representatives
October 18, 2005

Good afternoon, Mr. Chairman and members of the Subcommittee. My name is Joe Rogers. I am the former lieutenant governor of Colorado and currently serve on the National Commission on the Voting Rights Act. It is my pleasure and privilege to be before this distinguished subcommittee as it conducts the first hearing relating to the reauthorization of Voting Rights Act provisions scheduled to expire in 2007. I am pleased to be back on Capitol Hill where I spent several years serving as counsel to Colorado's former United States Senator, Hank Brown, who served on the Senate's Judiciary, Budget and Foreign Relations Committees.

I am here today to discuss the work of the National Commission on the Voting Rights Act. Before doing so, I wanted to provide some background on the Act and reauthorization. Forty years ago, in the face of great social turmoil, the Congress enacted legislation that made the promise of the right to vote under the 15th Amendment of the U.S. Constitution a reality, ninety five years after the Amendment's passage. This legislation, the Voting Rights Act, is generally considered to be the most effective piece of civil rights legislation ever passed by the Congress. The Act, with its combination of permanent and temporary provisions, has enabled tens of millions of minority voters to fully exercise their right to participate in the political process and elect candidates of their choice. Since 1965, Congress has reauthorized the Voting Rights Act in 1970, 1975, 1982, and 1992. With each reauthorization, Congress has expanded the Act's scope to confront emerging issues of voting discrimination that emerged from the Congressional hearing.

The expiring provisions which we are examining today include some of the core provisions of the Act. In addition to the coverage formula for some of the temporary provisions that is set forth in Section 4 of the Act, three substantive provisions will expire in 2007 if not reauthorized. *First*, Section 5 of the Act requires certain states, counties, and townships with a history of discrimination against minority voters to obtain approval or "preclearance" from the United States Department of Justice or the United States District Court in Washington, D.C. before they make any change affecting voting. These changes include, but are not limited to, redistrictings, changes to methods of election, polling place changes, and annexations. Jurisdictions covered by Section 5 must prove that the changes do not have the purpose or effect of denying or abridging the right to vote on account of race, color, or membership in a language minority. In recent years, the Supreme Court has limited the scope of Section 5 to voting changes that have the purpose or effect of worsening the position of minority voters. *Second*, Section 203 of the Act requires that language assistance be provided in jurisdictions or reservations where 5% or a total of 10,000 of the voting age citizens have limited-English proficiency and speak a particular minority language. Four language groups are covered by Section 203: American Indian, Asian, Alaskan Native, and Spanish. Covered jurisdictions must provide language assistance at all stages of the electoral process. As of 2002, a total of 466 local jurisdictions across 31 states are covered by these provisions. *Third*, Sections 6(b), 7, 8, 9, and 13(a) of the Act authorize the Attorney General to certify the appointment of a federal examiner to jurisdictions covered by Section 5's preclearance provisions on good cause and/or to send a federal observer to any jurisdiction where a federal examiner has been assigned. Since 1966, 25,000 federal observers have been deployed in approximately 1,000 elections.

The Lawyers' Committee for Civil Rights Under Law -- acting on behalf of the civil rights community-- created the non-partisan National Commission on the Voting Rights Act to document the record of enforcement of these provisions and the state of discrimination in voting during the past 23 years. The National Commission is comprised of eight advocates, academics, legislators, advocates and civil rights leaders who represent the diversity that is such an important part of our nation. The Honorary Chair of the Commission is the Honorable Charles Mathias, former Republican U.S. Senator from Maryland and the Commission Chair is Bill Lann Lee, former Assistant Attorney General for Civil Rights. The other commissioners are: the Honorable John Buchanan, former Congressman from Alabama; Chandler Davidson, scholar and co-editor of one of the seminal works on the Voting Rights Act; Dolores Huerta, co-founder of the United Farm Workers of America; Elsie Meeks, first Native American member of the United States Commission on Civil Rights; Charles Ogletree, Harvard law professor and civil rights advocate; and me. The Commission has two primary tasks: first, to conduct field hearings across the country to gather testimony relating to voting rights, and second, to write a comprehensive report detailing the existence of discrimination in voting since 1982, the last time there was a comprehensive reauthorization of the Voting Rights Act.

To date, the National Commission has held nine of ten planned hearings. It has held regional hearings in Montgomery, Alabama (March 11, 2005); Phoenix, Arizona (April 7, 2005); New York, New York (June 14, 2005); Minneapolis, Minnesota (July 22, 2005); Orlando, Florida (August 4, 2005); Los Angeles, California (September 27, 2005); and Washington, DC (October 14, 2005). The National Commission has also held state hearings in Americus, Georgia (August 2, 2004) and Rapid City, South Dakota (September 9, 2005). There will also be a state hearing in Jackson, Mississippi on October 29, 2005. We have heard from approximately 100

witnesses, who range from elected officials, election officials, voting rights attorneys and social science experts, community leaders, and concerned citizens who have testified about their experiences related to discrimination in voting.

The Commission's report will contain information from the hearings and extensive research culled from many sources including findings, reports and testimony from court cases and the Department of Justice enforcement record. The report's analysis will be quantitative and qualitative. The report will utilize maps to show graphically where there has been discrimination in the last twenty-three years. The report will not advocate for any particular legislative action. Instead, the purpose of the report is to detail the facts that will inform the debate concerning reauthorization.

At the request of the Judiciary Committee's staff, we have provided transcripts and testimony from the National Commission's hearings to the Judiciary Committee and we will provide all of the transcripts and testimony when the hearings are complete.

The reason an examination of the factual record is so important is that in order for Congress to reauthorize the Voting Rights Act in a manner consistent with recent Supreme Court rulings, Congress must have before it a record of discrimination in voting that is "congruent and proportional" to the remedies provided in the Voting Rights Act. Congress always has met this requirement in past reauthorizations of the Act. In fact, in recent cases where the Supreme Court has found that Congress exceeded its authority in enacting remedial legislation that went beyond the record supporting such legislation, the Court has cited the enactment and reauthorizations of the Voting Rights Act as the prime example where Congress developed a record of discrimination that necessitated a legislative remedy. As previous Congresses that have examined the Act, we certainly hope and expect that this Congress will engage in the same type

of careful examination, and we are extremely pleased that the House Judiciary Committee has taken its charge seriously based on the number and scope of the hearings it has scheduled.

Because one National Commission hearing remains and the report is months away from completion, it would be premature for me to detail the Commission's findings. Nonetheless, I would like to identify a few trends that have emerged from the hearings:

First, the testimony (and supporting documents) and the factual record of objections and cases filed under the Act reveal that the problem of discrimination in voting is significant and affects virtually every region of the country. In stating this, it is important to note that compared to 1965 there has been progress in regard to race and voting. Indeed, there has been a decrease in blatant racist activity as it relates to voting. Nonetheless, there are a significant number of state actors who in an effort to maintain or enhance their power have taken actions that clearly discriminate against minority voters. Plainly, whether the impetus is bigotry or power the end result – discrimination against minority voters—is the same.

Though minority participation has increased dramatically since the enactment of the Act, there are a number of devices that our witnesses have identified that have been used to negate the effect of increased minority voter participation. These devices include: changing from single member to at large districts, manipulating district lines to either pack or fragment minority voters, moving polling places, and selectively annexing or deannexing property to affect the racial demographics of a jurisdiction.

Second, in many areas of the country, voting continues to be racially polarized – most whites vote for different candidates than most minority voters. In the last decade, federal court cases involving statewide redistricting plans in Georgia, Louisiana, South Carolina, South Dakota and Texas have found that racially polarized voting exists in their states. This is

consistent with the testimony of witnesses who have discussed the existence of racially polarized voting. For example, Professor Richard Engstrom, one of the leading experts in the field, testified that his analysis shows that race still forms a demographic division in politics. Since the 2000 census, he conducted studies of racially polarized voting in several states. He found that racially polarized voting played a role in all levels of office from governor to the school board. This overwhelming pattern of racially polarized voting means that minority voters usually cannot elect candidates of choice unless they are a majority or near majority of the electorate. Professor Engstrom found this phenomenon prevalent in Alabama, Florida, Georgia, Mississippi and North Carolina. Because of racially polarized voting, a new voting procedure that harms minority voters is likely to achieve the electoral result desired by state actors who make the change.

Third, application of the minority language provisions frequently results in increased participation of minority language voters and a dramatic impact on the ability of such voters to elect candidates of their choice. Here are two of the several examples we have heard during the hearings. Although the City of Lawrence, MA had been covered by Section 203 since 1984, the jurisdiction had done little to comply with the law until the Department of Justice filed suit against the City in 1998. When the suit was filed, there was only one Latino elected to the City Council in its history. The lawsuit was settled in 1999 and one of the key provisions of the settlement was that the City was required to hire a Spanish-language elections coordinator. In the first election after the settlement, three Latinos were elected to the nine-member City Council and today four Latinos sit on the nine-member City Council. This increased electoral power has led to more responsive city government with the city hiring its first Latino police chief and school superintendent after the filing of the lawsuit. In Harris County, Texas, the County did not fulfill its obligations under Section 203 to provide language assistance to its Vietnamese voters.

After an agreement with the Department of Justice in 2003, the County provided the required assistance: bilingual poll workers and properly translated materials. In November 2004, voters in Harris County elected Hubert Vo, the first Vietnamese member of the Texas state legislature, by a handful of votes.

Fourth, the federal mandate of Section 203 enables election administrators to provide needed minority language assistance without political influence. In a soon to be released comprehensive survey of Section 203 covered jurisdictions by professors and students at Arizona State University, 71% of election administrators who responded to the question supported reauthorization of Section 203. Several election administrators have testified that because of the federal mandate, they are able to provide language assistance that otherwise might not be provided as a result of cost or policy issues raised by the elected governing body. The ASU survey also found that 46% of respondents stated that they incurred no additional expense in providing language assistance.

Fifth, the existence of Section 2 does not obviate the need for Section 5. There are several critical differences between Section 5 and Section 2. As the Supreme Court held in 1966 and Congress has stated in subsequent reauthorizations of the Act, Section 5 shifts the advantage of time and inertia from jurisdictions to minority voters. At little or no cost to minority voters and their advocates, voting changes that violate Section 5 are never implemented. In contrast, to establish a Section 2 violation, minority voters must hire a lawyer and experts and file an expensive lawsuit that may take several years to resolve. For example, in early 2001, the Department of Justice and private plaintiffs filed a lawsuit alleging that the method for electing the County Council for Charleston, South Carolina violated Section 2. The plaintiffs prevailed and three black preferred candidates (all of whom were African American) were elected in the

first election under single-member districts in 2004. The county spent over $2 million defending the lawsuit and has been ordered to pay the plaintiffs $700,000 in attorneys' fees. The Department of Justice also expended substantial resources. In 2003, after the federal district court had found in plaintiffs' favor, the South Carolina General Assembly passed a law which changed the method of electing the Charleston County School Board to that used by the County Council. The Department of Justice objected to this change under Section 5, thus preventing a second lawsuit that would have taken several years and cost millions of dollars.

In addition, Section 5 blocks jurisdictions from making last minute voting changes that harm minority voters. In months preceding the 2004 primary election, the Criminal District Attorney of Waller County, Texas threatened students at Prairie View A&M University, which has a 90% African American student body, with felony prosecution if they voted. The Prairie View A & M University NAACP filed a lawsuit against him that was settled shortly thereafter. Five days after the lawsuit was filed, and a month before the March 2004 primary election, the Waller County Commissioners' Court, the county governing body, voted to decrease the number of hours of early voting at the polling place where the students voted from 17 hours to 6 hours. This was particularly discriminatory because the students were on spring break on the date of the primary. A second lawsuit was filed on the ground that the Commissioners' Court had not sought Section 5 preclearance for this last minute change. Within a week after the Section 5 enforcement action was filed, the Commissioners' Court restored the number of early voting hours. A total of 346 students voted during the restored early voting period and a student running for Commissioners' Court prevailed in his primary by less than 40 votes.

The Commission's report will go into much greater detail about the issues discussed above and a multitude of other issues. The Commission will be working very hard over the next

couple of months to detail as complete a record as possible of the current state of racial discrimination in voting. When the report is complete, the Commission is ready, willing, and able to provide the report to the Judiciary Committee and discuss its contents if the Judiciary Committee or the Subcommittee on the Constitution so desires.

Thank you for inviting me to testify at today's hearing.

.